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# In the Supreme Court of the United States

OCTOBER TERM, 1962

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No. 986

ANTHONY JOSEPH ZAMBITO, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on March 5, 1963 (Pet. App. 9a). The petition for a writ of certiorari was filed on April 3, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the provisions of 18 U.S.C. 1952 and 1953, prohibiting interstate activity involving gambling illegal under state law, are unconstitutionally vague and incapable of uniform enforcement by reason of the variances in state anti-gambling laws.

2. Whether the jury could properly find, on the basis of evidence showing that petitioner took over the "banking" activities of a numbers business operating in two states, that petitioner had knowledge that runners, in the course of collecting wagers for him, were crossing state lines.

3. Whether petitioner was properly convicted for causing the traveling in interstate commerce with intent to promote a numbers business, and in the course of the same transaction, causing the carrying of numbers slips in interstate commerce.

4. Whether, on a federal application for wagering registry, the entry of the word "None", an untrue response to an inquiry as to the number of agents receiving wagers for the applicant, constituted a false statement of a material fact within the meaning of 18 U.S.C. 1001.

## STATUTES INVOLVED

Title 18 of the United States Code, Section 1952 provides in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

Title 18 of the United States Code, Section 1953 provides in pertinent part:

(a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both.

(b) This section shall not apply to (1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials

used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication.

Title 18 of the United States Code, Section 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

## STATEMENT

A six-count indictment returned in the United States District Court for the Northern District of West Virginia charged petitioner and others with offenses growing out of illegal interstate gambling activity. Counts 2 and 4 charged that petitioner on December 13, 1961, caused others (see 18 U.S.C. 2) to travel in interstate commerce from separate points in Ohio to Wheeling, West Virginia, with intent to promote a numbers operations, unlawful under state law, and with an attempt thereafter to carry on such unlawful activity in violation of 18 U.S.C. 1952.

Counts 3 and 5 charged that petitioner, on the same date, caused others to carry numbers paraphernalia between the points described in violation of 18 U.S.C. 1953. Count 1 charged a conspiracy (18 U.S.C. 371) to commit the substantive offenses condemned by 18 U.S.C. 1952 and 1953. Count 6 charged petitioner with falsely representing a material fact on a wagering tax return in violation of 18 U.S.C. 1001 (App. 6-13).[1]

After a trial by jury, petitioner was found guilty on all counts. He was sentenced to imprisonment for a period of two years on each of the counts, the terms on counts 1 (the conspiracy) and 6 (the false statement count) to run concurrently, and the terms on counts 2 through 5 (the substantive counts) to run concurrently with each other but consecutively to the terms imposed upon counts 1 and 6 (App. 2-3).

The evidence, developed through government and defense witnesses alike, and largely undisputed, is as follows:

In early September 1961, two numbers "bankers" of Martin's Ferry, Ohio, disturbed by the enactment of strict anti-gambling laws by the state of Ohio as well as federal laws prohibiting interstate gambling activity, decided to disassociate themselves from the illicit business which they had operated for more than twenty years with the help of "writers" or "runners" collecting bets in Ohio and northern West Virginia. Because they did not want to leave these

[1] Unless otherwise indicated "App" refers to the appellants' appendix in the court below. "Tr." refers to the transcript of trial proceedings lodged herewith.

"runners" without a "bank", they approached petitioner, the owner of the Jolly Bar in Wheeling, West Virginia, with respect to taking over the business, discussing with petitioner the laws in question. After some initial hesitation, petitioner agreed to take over and, on September 18, 1961, began operations with numbers books and other paraphernalia delivered to him by the Ohio bankers (Tr. 168-208; 362-376).

Petitioner operated as a "banker" for three months, daily receiving customer wagers and number slips delivered to him at the Jolly Bar by runners working on a percentage basis. All of the runners had "hits" during this period and paid off the winning customers with proceeds from petitioner's bank. Petitioner's four regular runners had formerly written numbers for the Ohio bankers. Two of the runners, Hale and Rogerson, had resided in Ohio for many years. While the evidence is not clear as to whether they had always made Ohio collections,[2] it is undisputed that, during the period of petitioner's operation through December 13, 1961, Hale and Rogerson would as a daily procedure collect wagers from Ohio customers,

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[2] Snyder, one of the Ohio bankers, testified that during the period when he and his partner, Fox, operated the bank in Ohio, Hale, if he did make collections in Ohio, wrote "very, very few". He did not know about Rogerson (Tr. 207). Fox testified that neither Hale nor Rogerson at this time wrote numbers in Ohio (Tr. 371), but later admitted "As a matter of fact, we didn't know where they got their business from" (Tr. 376). Hale testified that when writing for the Ohio bankers he did not make Ohio collections but began to do so without petitioner's knowledge, when petitioner took over the bank (Tr. 429). Rogerson, a codefendant (as was Hale) did not take the stand.

cross the Ohio River and bank the slips and proceeds with petitioner in West Virginia. On December 13, 1961, government agents raided the Jolly Bar, arrested petitioner and his associates, conducted a search of the premises and confiscated money and gambling paraphernalia. By petitioner's estimate, gross receipts for the three month period totalled $9,000 (Tr. 441-464; 29-138).

Petitioner testified that he did not know that Hale and Rogerson were picking up wagers in Ohio. In a motion for judgment of acquittal he argued that the government had failed to show that he had knowledge of the interstate character of his operations (Tr. 468-469). The court overruled the motion. In its instructions to the jury, discussing the charges that petitioner caused others to travel in interstate commerce in the promotion of unlawful activities, the court said (Tr. 493-494):

> * * * You will note that for a finding of guilty as to Zambito in this respect, it would be necessary for you to find either that Zambito knew of the writing of numbers in Ohio on the particular occasion, or that he knew of such writing of numbers on former occasions and was indifferent as to the place where the numbers had been written or of the source of business. Only if you find such knowledge will you be able to find that Zambito either induced the violations by Hale and Rogerson or caused them.

Similarly, the court instructed that the jury must find that Zambito knowingly induced or caused the carrying of numbers slips between the states of Ohio and West Virginia.

## ARGUMENT

1. Petitioner for the first time in this Court urges (Pet. 12-15) that Sections 1952 and 1953 of Title 18 U.S.C. are unconstitutionally vague and capricious. He does not specifically challenge the wording of the statutes as vague; rather, the main thrust of his argument appears to be that since gambling is variously defined and controlled by the several states, the federal statutes, to the extent that they prohibit conduct involving a violation of state law, are uncertain and incapable of being uniformly enforced. There is no merit to this contention. Insofar as Section 1952 is pertinent here, it proscribes interstate travel in promotion of defined unlawful activity. The "unlawful activity" is not simply a business enterprise involving gambling but a "business enterprise involving gambling * * * offenses *in violation of the laws of the State in which they are committed* * * *" (see subsection (b), p. 3 *supra*, emphasis supplied). There is nothing difficult of interpretation as to the conduct thus prohibited. A "business enterprise" is a term of common usage. See, e.g., *Bohn* v. *United States*, 260 F. 2d 773 (C.A. 8), certiorari denied, 358 U.S. 931. The particular gambling offense involved is either legal or illegal under the law of the State where the crime was committed. The whole purpose of the statutes (and the legislative history of the Act makes this abundantly clear) was to assist the States in the enforcement of local laws. See *Hearings* on S. 1653-1658, 1665, *Committee on the Judiciary*, U. S. Senate, 87th Congress, 1st sess. It is of

no import that these laws might vary as between the several States. There is no constitutional objection to Congress specifying that a federal statute will come into operation in conjunction with various unnamed state or federal offenses. See 18 U.S.C. 1262 prohibiting the transportation of intoxicating liquors into states which prohibit the sale of such liquor. See also 18 U.S.C. 1073 (Fugitive Felon Act) and 18 U.S.C. 13 (Assimilative Crimes Statute).

As to Section 1953, the recitation of items that are forbidden to be carried in interstate commerce (as "record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing or other device used * * *") is detailed; the gambling activities with respect to which such items must be used, adapted, devised or designed for use in order to fall within the prohibition (bookmaking, sporting event wagering pools, and numbers) are specifically set forth. The section is made inapplicable by express terms (see subsection b) to certain parimutuel and sporting event betting materials to be used in States where such betting is legal, and to newspapers.

The legislative history of this section shows that the lengthy itemization of proscribed articles was deliberate. Congress intended to insure that anything designed to be used in the enumerated gambling activities should be swept from the channels of interstate commerce. Its broad coverage as such does not go to the question of constitutionality.

The basic issue is whether this legislation adequately gives notice of the required conduct to one who would avoid its penalties. See *Boyce Motor Lines,*

*Inc.* v. *United States*, 342 U.S. 337; *United States* v. *Petrillo*, 332 U.S. 1; *Roth* v. *United States*, 354 U.S. 476. The legislation here provides ample warning as to the conduct which falls within its ban. Certainly petitioner, in the circumstances of this case, has no basis for a claim of vagueness or uncertainty. There is no question that the numbers activity which he promoted was unlawful under the laws of West Virginia, the State in which he operated, or that the numbers slips which he caused to be transported are forbidden to interstate commerce.

2. Petitioner, relying upon *Ingram* v. *United States*, 360 U.S. 672, argues (Pet. 16-17) that the government did not adequately prove that he knew that the codefendants Hale and Rogerson were soliciting wagers outside West Virginia. The evidence showed that petitioner, as the proprietor of the business, dealt with two writers who had lived in Ohio for a substantial number of years. He himself testified that he knew Rogerson lived in Ohio (Tr. 451). He was in daily contact with these writers for a period of three months, accepting the slips and proceeds they tendered and paying from his bank the sums necessary to pay off their "hits". Petitioner knew that the writers in the business which he took over had regularly collected wagers from customers in both States. He was aware that severe penalties might follow from a continuation of the collections in Ohio. Yet he exercised no supervision and made no inquiries to insure that there was no longer an Ohio source of revenue when he took over. As the court below noted, these circumstances fairly justify

if they do not indeed compel, an inference of a common purpose to solicit and accept bets from any source without geographical limitations. See *United States* v. *Crimmins*, 123 F. 2d 271, 273 (C.A. 2); *Pereira* v. *United States*, 347 U.S. 1, 12; see also *Corey* v. *United States*, 305 F. 2d 232, 237 (C.A. 9); *United States* v. *Starkey*, 52 F. Supp. 1, 3 (E.D. Ill.).

The *Ingram* case gives no support to petitioner's position. There this Court held that two minor clerical employees of a numbers operation illegal under state law were improperly convicted of a conspiracy to evade the payment of federal wagering taxes in the absence of evidence that they knew their principals (whose convictions were affirmed) were liable for, or had not paid, the taxes. Here petitioner was the entrepreneur and, as noted above, there was a sound basis in the evidence for the inference that he had knowledge of the interstate activities of the writers for whom he acted as banker.

3. Little need be said with respect to petitioner's contention (Pet. 18-19) that he could not be punished consecutively for causing travel in interstate commerce with intent to promote a numbers business and for causing, upon the same occasion, the carrying of numbers slips in interstate commerce. The fact is that petitioner's sentences on the substantive offenses of counts 2 through 5 were imposed to run concurrently. Thus, even if there were a serious question as to whether the offenses involved separate elements and might be separately punished, there would be no occasion to reach that issue in this case.

4. Petitioner also argues (Pet. 17-18) that his entry of the word "None" in response to a question on his application for registry-wagering, as to the number of employees and/or agents engaged in receiving wagers on his behalf, was not a falsification of a material fact within the meaning of 18 U.S.C. 1001. Congress obviously regarded the information as material since the statute, 26 U.S.C. 4412(a)(2), specifically requires persons registering as engaged in the business of accepting wagers to furnish the name and place of residence of each person engaged in receiving wagers for him or on his behalf. Petitioner's false statement was calculated to pervert the legitimate functions of government. As the court below noted, the fraudulent concealment of names and address of other personnel—such as writers who might be subject to occupational tax liability (26 U.S.C. 4411)—tends to obstruct the administration of a valid tax measure.[3]

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[3] *Paternostro* v. *United States*, 311 F. 2d 298 (C.A. 5), relied upon by petitioner is wholly inapposite. There, the defendant, in the course of an investigation, had been placed under oath and had answered questions propounded to him by a government agent. The Fifth Circuit held that under those circumstances, where the accused did not initiate any positive or affirmative statement calculated to pervert the legitimate functions of government, his negative responses during the question and answer conference were not "statements" within the meaning of 18 U.S.C. 1001. This is very different from giving false response to answers required by statute for registration.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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